DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return--that is a matter entirely up to you.

[9th Cir. #3.1

USE OF NOTES

You may use notes taken during trial to assist your memory. Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

[9th Cir. 3.2]

WHAT IS EVIDENCE

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. the exhibits which have been received into evidence; and
3. any facts to which all the lawyers have agreed or stipulated.

[9th Cir. 3.3]

JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Languages other than English have been used during this trial.

The evidence you are to consider is only that provided through the official court interpreter. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.

[9th Cir. 3.4]

WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. For example, the witness testifies "I saw Joe break the glass". Circumstantial evidence is proof of one or more facts from which you could find another fact. For example, the witness testifies "I saw Joe holding the glass before I left the room. No one else was in the room. When I returned, the broken glass was lying at Joe's feet." You could find that Joe had broken the glass in either example. You must consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

[Modified from 9th Cir. 3.6]

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

[9th Cir. 3.7]

DISCREPANCIES IN TESTIMONY

Discrepancies in a witness's testimony or between such witness's testimony and that of other witnesses, if there were any, do not necessarily mean that such witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.

[BAJI 2.21]

WITNESS WILFULLY FALSE

A witness false in one part of his or her testimony is to be distrusted in others. You may reject the entire testimony of a witness who wilfully has testified falsely on a material point, unless, from all the evidence, you believe that the probability of truth favors his or her testimony in other particulars.

[BAJI 2.22]

CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries that have not been received in evidence have been shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

[9th Cir. 3.10]

CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

[9th Cir. 3.11]

BURDEN OF PROOF--PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true. This means that if you conclude that the weight of the evidence on a claim is evenly balanced, you must find for Defendants. If you conclude that the weight of the evidence favors Plaintiff, even slightly, you must find for him.

You should base your decision on all of the evidence, regardless of which party presented it.

[9th Cir. 5.1]

BREACH OF ORAL CONTRACT TO PAY WAGES — ELEMENTS

Plaintiff and Defendants had an oral contract, pursuant to which Plaintiff would be paid wages of $7.50 per hour for work performed by Plaintiff. Plaintiff seeks to recover damages for Defendants' failure to pay Plaintiff $7.50 per hour for work performed by Plaintiff during the period from January 8, 1996, through October 20, 1997. To prevail on this claim, Plaintiff has the burden of proving each of the following by a proponderance of the evidence:

1. Plaintiff performed work for Defendant; and
2. Defendants failed to pay Plaintiff $7.50 per hour for Plaintiff's work.
3. Damages to Plaintiff caused by the failure to pay.

[Modified from P's 2Supp #9, P's Supp. #3, and BAJI 10.85]

BREACH OF ORAL CONTRACT TO PAY WAGES — DAMAGES

If you find that Defendants breached the oral contract to pay Plaintiff wages of $7.50 per hour for work performed by Plaintiff, Plaintiff is entitled to recover damages in the amount of any compensation or wages you find were not paid to him during the period from January 8, 1996, to October 20, 1997.

[Modified from P's Supp #6, P's 2Supp #10]

MINIMUM WAGE — ELEMENTS OF PROOF — DEFINITION

Plaintiff also claims that during the period from January 8, 1995, to January 7, 1996, Defendants failed to pay Plaintiff the minimum wage required by state and federal law. While the statute of limitations prevents Plaintiff from recovering damages for breach of oral contract prior to January 8, 1996, the statute of limitations for minimum wages claims is one year longer.

On this claim, Plaintiff has the burden of proving by a preponderance of the evidence that Defendants failed to pay Plaintiff the lawful minimum wage. The minimum wage was $4.25 per hour during the relevant time period of this lawsuit.

If you find for Plaintiff on this claim, Plaintiff is entitled to recover for the period of January 8, 1995, to January 7, 1996, the difference between the minimum wage of $4.25 per hour and what you determine Plaintiff was actually paid for work he performed during that period.

[Modified from P's 2Supp #11 and D's objections]

OVERTIME — ELEMENTS OF PROOF — DEFINITION

Plaintiff also claims that during the period from January 8, 1995, to October 20, 1997, Defendants failed to pay Plaintiff the overtime compensation required by state and federal law.

"Overtime" is the time that an employee works in excess of 40 hours per week. "Overtime compensation" is a rate not less than one and one-half times the non-overtime rate an employee is paid pursuant to agreement between employee and employer.

On this claim, Plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. That he worked in excess of 40 hours per week; and
2. That Defendants failed to pay Plaintiff overtime compensation at the lawful overtime rate.

If you find for Plaintiff on the overtime claim, Plaintiff is entitled to recover the difference between the overtime rate of $11.25 per hour and what you determine Plaintiff was actually paid for his overtime work between January 8, 1995, and October 20, 1997.

[modified from P's 2supp #11 & 12]

MINIMUM WAGE AND OVERTIME — DAMAGES — INSUFFICIENT RECORDS

An award of damages that is otherwise justified by the minimum wage and overtime laws will not be barred simply by an employer's failure to keep accurate records of the amount and extent of an employee's work. An employer has an obligation to keep proper records of hours and wages for its employees.

If you have determined that Plaintiff performed work for which he was improperly compensated, and if Plaintiff has produced enough evidence to support a just and reasonable inference of the amount and extent of such work, then the burden of proof shifts to Defendants to show the precise number of hours worked or to negate the reasonableness of the inference to be drawn from Plaintiff's evidence. If Defendants fail to meet this burden, you may award Plaintiff damages even if the result may be only approximate.

[Modified from P's 2Supp #8]

NON-PAYMENT OF COMPENSATION — ELEMENTS

Plaintiff also claims that when his employment ended, Defendants unlawfully failed to pay him wages or other compensation that he had earned. On this claim, Plaintiff may recover under either of two theories.

Under the first theory, Plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. That he was discharged by Defendants; and
2. That at the time he was discharged, he had earned wages or other compensation for which he had not yet been paid; and
3. That Defendants willfully failed to pay any such earned and unpaid compensation immediately upon discharging Plaintiff.

Under the second theory, if you find that Plaintiff quit, Plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. That at the time Plaintiff quit, he had earned wages or other compensation for which he had not been paid; and
2. That Defendants willfully failed to pay any such earned and unpaid compensation to Plaintiff within 72 hours after he quit his employment.

Defendants acted "willfully" if they intentionally failed or refused to pay Plaintiff's earned wages.

If you find for Plaintiff on this claim, Plaintiff is entitled to recover a penalty equal to Plaintiff's daily pay rate for each day that wages remained unpaid, up to a maximum of 30 days.

BREACH OF CONTRACT OF EMPLOYMENT FOR UNSPECIFIED TERM: INTRODUCTORY—ESSENTIAL ELEMENTS—DEFINED

Plaintiff also seeks to recover damages based upon a claim of breach of a contract of employment having no specified term as to the duration of the employment.

On this claim, Plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. There was an employment contract between Plaintiff and Defendant having no specified term as to the duration of the employment;

2. Pursuant to the employment contract, Defendants were subject to an express or implied obligation not to discharge Plaintiff, except for good cause;

3. Plaintiff's performance;

4. Defendant breached the employment agreement by terminating Plaintiff's employment without good cause; and

5. The termination caused Plaintiff to suffer injury, damage, loss or harm.

[BAJI 10.03]

EMPLOYMENT CONTRACT - DEFINITION

A contract of employment is a contract by which one person, called the employer, hires another person, called the employee, to do something for the benefit of the employer or a third person for which the employee receives compensation. The contract may be oral or written, express or implied in fact.

[BAJI 10.0]

EMPLOYMENT CONTRACT—TERM NOT SPECIFIED—TERMINATION

An employment contract having no specified term may be terminated at will by the employer by giving notice to the employee, unless the employer and the employee have expressly or impliedly agreed that the employee will not be discharged by the employer except for good cause.

[BAJI 10.10]

EMPLOYMENT CONTRACT))TERM NOT SPECIFIED))IMPLIED AGREEMENT NOT TO TERMINATE EXCEPT FOR GOOD CAUSE

An obligation in an employment contract for an unspecified term not to discharge an employee except for good cause is implied and becomes a term of that contract even though not expressly stated by the employee and employer, when from all of the circumstances surrounding the employment, whether from words or conduct, it is reasonable for the employee to conclude and believe and the employee does conclude and believe that the employment will not be terminated except for good cause.

Factors which you may consider in determining whether there is such an implied agreement include, but are not limited to: the duration of employment, promotions of the employee, salary increases to the employee, commendations to the employee, awards to the employee, lack of criticism of the employee's work, assurances by the employer that the employee will continue to be employed, the employer's acknowledged employment policies, and the employer's custom and practices with respect to employee's.

[BAJI 10.12]

GOOD CAUSE—TERM NOT SPECIFIED—DEFINITION

Where there is an employment agreement not to terminate or otherwise take adverse actions against an employee except for good cause, an employer may not terminate the employment of an employee or otherwise take adverse actions against an employee unless such termination or adverse action is based on a fair and honest cause or reason. In determining whether there was good cause, you must balance the employer's interest in operating the business efficiently and profitably with the interest of the employee in maintaining employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. The scope of such discretion is substantial but not unrestricted.

[BAJI 10.13]

EMPLOYMENT CONTRACT))TERM NOT SPECIFIED))BREACH OF COVENANT NOT TO DISCHARGE EXCEPT FOR GOOD CAUSE

An employer, who without good cause, terminates a contract of employment that contains an express and/or implied agreement that the employee will not be terminated except for good cause, is in breach of the contract.

[BAJI 10.14]

BREACH OF EMPLOYMENT CONTRACT—TERM NOT SPECIFIED—DAMAGES

If Defendant breached the employment contract with Plaintiff, Plaintiff is entitled to recover monetary damages caused by the breach.

Damages for breach of the employment contract are the amount of compensation agreed upon for the period determined to be a reasonable period that Plaintiff's employment would have continued but for the breach of the employment contract, inluding any overtime wages Plaintiff proves he would have earned during that period, less any compensation actually earned by the employee during that period.

[BAJI 10.15]

DAMAGES—MITIGATION

An employee who was damaged as a result of a breach of an employment contract by the employer, has a duty to take steps to minimize the loss by making a reasonable effort to find and retain comparable employment.

If the employee through reasonable efforts could have found and retained comparable employment, any amount that the employee could reasonably have earned by obtaining and retaining comparable employment through reasonable efforts shall be deducted from the amount of damages awarded to employee.

[BAJI 10.16]

DUTY TO DELIBERATE

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

[9th Cir. 4.1]

COMMUNICATION WITH COURT

If it becomes necessary to communicate with me during deliberations, you may send a folded note through the marshal or clerk, signed by a juror. Do not disclose the content of your note to the marshal or clerk.

Do not communicate with the court about the case except by a signed note. I will only communicate with you regarding the case in writing or in open court.

Do not disclose any vote count in any note to the court.

[9th Cir. 4.2]

RETURN OF VERDICT

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the marshal in whose charge you will be that you have reached a verdict.

[9th Cir. 4.3]